No. 12,869

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND WRIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES.

EVERETT W. HEPP,
United States Attorney,
HUBERT A. GILBERT,
Assistant United States Attorney,
Fourth Judicial Division, Territory of Alaska,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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JURISDICTION.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Fourth Division, sentencing the defendant to imprisonment for two years in the Federal Penitentiary at McNeil Island, Washington. Said judgment was entered on the 22nd day of November, 1950 (Tr. of R. 7), pursuant to a jury trial and verdict of "Guilty" (Tr. of R. 6) of the alleged crime of feloniously having in his possession and under his control a narcotic drug, to-wit, marijuana, as charged in the indictment (Tr. of R. 3) based on Title 40, Chapter 3, Section 2 of the Alaska Compiled Laws Annotated, 1949 (Volume 2, page 1104). Notice of appeal was filed the 27th day of November,

1950. The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, 31 Stat. 322, as amended, 48 U.S.C., Section 101, likewise constituting Title 53, Chapter 1, Section 1, Alaska Compiled Laws Annotated, 1949. The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U.S.C., Section 225(a); now 28 U.S.C. New, Section 1291.

QUESTIONS RAISED.

Whether evidence of prior similar acts of the defendant was properly admitted by the trial Court; whether the Court improperly refused to limit by instruction such evidence to the purposes for which it was introduced; and whether the Court wrongfully excluded testimony, both on cross-examination of witnesses and direct examination of appellant, offered for the purpose of showing feeling and motive.

STATEMENT OF THE CASE.

On the 4th day of August, 1950, a group of law enforcement officials comprised of representatives of the United States Marshal's office, the United States Treasury Department, and the office of Special Investigation of the Military, searched the premises of a local building known as the "Club 69", located in the outskirts of Fairbanks, Alaska, pursuant to a search warrant issued for that purpose. The search was made

for narcotics. During the search sixteen marijuana filled cigarettes, bound together with a rubber band, were found behind an overstuffed chair located in the living room of the "Club", one pocket-sized tobacco can was found in a cabin situate immediately behind the "Club 69" and three tobacco cans were found in the grass approximately three or four feet west of the southernmost cabin located on the premises. The contents of the tobacco tins were examined by a chemist and found to be marijuana. The defendants, Raymond Wright and his wife, Vernestine Wright, were arrested and later indicted for the crime of feloniously possessing and having under their control a narcotic drug, to-wit, cannabis sativa indica, commonly referred to by the name of "marijuana".

During the course of the trial, the Government introduced into evidence the sixteen marijuana cigarettes and the marijuana residue of the tobacco tins. The Government was unable to produce the cans for the reason that the Treasury Agent's six-year-old boy destroyed them during his absence. The defendants, in their opening statement, asserted as their theory of defense a general denial of the allegations of the Government with the added proposition that if narcotics had been found in or about the premises of the "Club 69", its public status stripped from its owners or managers the full responsibility in terms of possession and control of everything contained thereon or therein.

ARGUMENT.

I.

EVIDENCE OF PRIOR SIMILAR ACTS OF THE DEFENDANT WAS PROPERLY ADMITTED BY THE TRIAL COURT.

This appellee is fully in accord with appellant's statement of the law that evidence of offenses other than those charged in the indictment are inadmissible to prove or tend to prove the truth of any charge contained in the indictment. More formally stated in *Johnson v. United States,* 22 Fed. (2d) 1, Judge Bean of this Court stated:

> "The general rule is unquestioned that, when a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible."

supporting which the Court set forth various authorities, including *Smith v. United States,* cited in appellant's brief, page 3. However, Judge Bean continues to say:

> "While this is the general rule, the exceptions are so numerous that it has been said: 'It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.' "

The judge continues in his opinion with the statement "evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense", for which general knowledge he cites numerous authorities. Again: *Simpkins v. United States,* 78 Fed. (2d) 594, at page 598, wherein the Court said:

> "This is not to say that in all cases evidence of other crimes and collateral matters are to be excluded because not contended in an indictment, as there are a number of well recognized exceptions to the rule. Thus, where the motive or special intent of the defendant is an element in the crime charged against him, or it otherwise becomes necessary to show his purpose, knowledge or design, evidence of similar transactions are admissible if not too remote in point of time."

At bar, the appellee's cause before the trial Court was premised in chief upon the evidence of narcotics lawfully seized from the premises of the "Club 69". The "Club 69" was occupied by the appellant, Raymond Wright, and his wife, Vernestine Wright. (Tr. of R. 143, 144, 156, 157, 168, 184, 185.) As is inherent in cases of this type and as so set forth in the Court's instructions, the Government was obliged to prove that the defendants feloniously and knowingly had possession of and under their control a narcotic drug, to-wit, marijuana. Knowledge, therefore, was a material allegation. Considering now the relatively strong likelihood of inferences raised against circumstantially proved possession and control by owners or managers of a public place, it was indispensable to the Government's case that a showing be made dealing directly with the knowledge of the defendant. It was for this reason, namely, to dispel such a strong inference of accident or non-responsibility solely by reason of owning or managing a public place, particularly in view of the appellant's absence during the seizure, that the Government saw fit to introduce evidence that on oc-

casions immediately prior to the date on which the search warrant was executed and served the appellant, Raymond Wright, had, in, fact, knowingly possessed, used and sold narcotics similar to the type found during the search. In support of apellee's contention of the admissibility of such evidence, reference is made to *Wigmore's Code of Evidence* (3rd Ed.), Volume 2, Section 301, page 193, et seq., setting forth the general principles governing such a proposition, wherein Professor Wigmore states that the "use of evidence of former offiences involves the other general mode of showing knowledge, namely, the use of external circumstances like 'a priori' to have produced knowledge". The following passages in Wigmore cite authorities dating back to 1846, bearing out the rule as he states it. That Courts have consistently recognized the showing of knowledge and intent by other similar acts (or of offenses) to be a well recognized exception of the general rule is amply borne out by the following decisions:

Bonelle v. United States, 53 Fed. (2d) 997:

"Evidence of other similar offenses is competent to show guilty knowledge, notice, or intent."

Breedin v. United States, 73 Fed. (2d) 778:

"* * * It is well settled that, as bearing upon the question of intent, purpose, design, or knowledge, evidence of similar transactions occurring at or about the same time is competent."

Stubbs v. United States, 1 Fed. (2d) 837 (C.C.A. 9th C., rehearing denied):

Syllabus: In prosecution for selling narcotic drugs without having registered and paid

special tax, witness to whom alleged unlawful sale was made was properly permitted to testify to previous sales made by defendant, in order to show that defendant was person required to register.

Casey v. United States, 20 Fed. (2d) 752 (C.C.A. 9th C., rehearing denied):

Syllabus: Testimony relating to acts unconnected with sale of morphine specifically alleged held admissible to show that defendant was person dispensing narcotics and required to register.

In this case, Judge Dietrich said:

"The only ones (assignments) seriously argued cover testimony relating to acts and circumstances which it is contended are unconnected with the alleged sale on December 31st, and relate to offenses not charged; *but all of it directly or indirectly tended to show that on December 31st defendant was dealing in and dispensing narcotics,* and also that defendant was a person required to register; hence, it was relevant." (Italics ours.)

Caldwell v. United States, 78 Fed. (2d) 282:

Syllabus: Evidence of similar transactions is admissible under certain circumstances as bearing on question of intent, purpose, design, or knowledge.

Sargent v. United States, 35 Fed. (2d) 344 (C.C.A. 9th C.):

Syllabus: In prosecution of physician for selling morphine sulphate, evidence of previous sales was admissible.

In this case, the Court cites:

Thompson v. United States, 288 Fed. 196;
William v. United States, 294 Fed. 682;
Casey v. United States, supra.

McFarland v. United States, 65 Fed. (2d) 74 (C.C.A. 9th C.):

Syllabus: In prosecution for unlawful purchase of morphine, bindles of narcotics purchased on several occasions prior to defendant's arrest held admissible.

Innumerable additional authorities could be listed supporting the admissibility of such evidence. Further, there seems no room to doubt that Courts have generally applied the recognized exceptions of the rule to all varieties of cases notable among which are possession violations, fraud, and false pretense cases. In view of this wealth of support, appellee contends that the trial judge did not err in admitting evidence in the case at bar of other acts of the defendant showing and tending to show knowledge and design, even though the acts evidenced thereby may incidentally have been crimes. Counsel's argument that the names of the purchasers were not made known has little merit as it could hardly be said that a failure of identification of all the parties to a witnessed transaction strips entirely the relevancy of such witnesses' statement concerning the substance of the transaction.

The only remaining question concerning this assignment, as gleaned from appellant's brief, deals with the order of proof consistent with good court prac-

tices, suggested by counsel's citing in his points and authorities, page 2, a portion of the case *Smith v. United States,* 10 Fed. (2d) 787-788, setting forth a rule that on cross-examination of accused the defendant's denial of matters entirely collateral with the matters with which he was charged bound the prosecution, and it was error to allow the prosecution to offer rebuttal evidence that the defendant had been so engaged. In the first place, in the case at bar the record fails to show wherein the prosecution offered any rebuttal evidence of the appellant's engagement in any matter, which statement of failure is strengthened by the absence of any reference to any part of the record supporting appellant's position. The rule seems well stated concerning the order of proof in *Wigmore's* treatise, Section 307, Volume 2, page 207, wherein Professor Wigmore states that "Intent in virtually all offenses is material and is therefore a part of the case to be proved in chief; and that unless the precise defense be disclosed in advance the prosecution may in fairness assume that intent may come into issue." Closely analogous, of course, to intent is the precise defense be disclosed in advance the prosesuch is a part of the case to be proved in chief. It seems to the appellee that appellant's citations would more appropriately apply to the situation wherein the prosecution offered rebuttal evidence to matters testified to by the defendant with the effect of impeaching his credibility and otherwise attacking his character which would not, premised alone on such propositions, be at issue and, accordingly, not subject to

attack. Appellee, therefore, respectfully urges that no meritorious assignment is raised on this point.

II.

THE TRIAL COURT DID NOT IMPROPERLY REFUSE TO LIMIT BY INSTRUCTION THE EVIDENCE OF PRIOR SIMILAR ACTS TO THE PURPOSES FOR WHICH SUCH WAS INTRODUCED.

Concerning next appellant's assignment of error in what he claims was the failure in duty of the Court to instruct the jury and limit the evidence to the purpose for which it was intended, he has referenced his brief with Transcript of Record, pages 245, 246 and 247, wherein the court apprised counsel for the appellant that the instruction about to be given would limit the finding of fact of guilt to a day certain named in the Indictment, to-wit, the 4th day of August, and in addition to which the Court invited appellant to present any instruction in mind for consideration. Referring now to the instruction given by the Court (T. of R. 249, Instruction I-a), wherein the following language appears:

> "From the above the jury will note that the possession of a narcotic drug mentioned in the indictment must be known to a defendant at the time and place mentioned in said indictment in order that he or she may be guilty of the crime charged."

Appellee can conceive of no stronger language instructing the jury as to the time element than the di-

rect statement made by the Court in its instructions. Further, appellee contends that as a result of considerable search in the authorities dealing with this subject, very little discussion by the Courts was found indicating a practice of, let alone a mandate for, specific instructions exhaustively covering the purpose for which the admission of such evidence may be considered. The general theory of the law seems well established that under the rule of multiple admissibility, evidence which is relevant and material as tending to prove the issues before a court is admissible unless rejectable for specific reasons. The propositions of theory upon which the rules of evidence are necessarily premised are generally inherently incapable of being expressed in terms understandable by jurors for which reason the law has left the question of admissibility or non-admissibility to the discretion of the trial Court and the higher Courts for review, quite evidently not being content to rely upon a juror sifting the wheat from the chaff by a yardstick of explanation given to him in terms often beyond his experience. Certainly, in the case at bar the trial Court's simple, definite and direct instruction as to time and place seem adequate, both as to authority precedent and legal theory, and is, therefore, worthy of honor.

For authority supporting appellee's position in this assignment attention is respectfully directed to the following:

Federal Rules of Criminal Procedure, Rule No. 30, U.S.C.A., Title 18, page 22, entitled "Instructions":

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* * * *" (Italics ours.)

23 *Corpus Juris Secundum,* page 944:

"As a general rule, where the court has instructed generally as to the issues, if accused desires a particular instruction or an instruction upon a particular phase of the case, he should submit it with a proper request that it be given, otherwise a failure to give it is not error, * * *"

citing numerous authorities in support of such rule.

Referring again to appellant's reference in his brief (page 2) wherein he cites Transcript of Record, pages 245, 246 and 247, in support of his statement that the Court refused to instruct the jury limiting the evidence to the purpose for which it was intro-

duced, appellee cites a portion of the language of the transcript appearing on those pages, bearing on this point:

> "Mr. Hurley. Even in the cases where other crimes are admissible, it is only admissible for absolutely one purpose and—— (Interrupted).
>
> The Court. *If you have an instruction to present, I will consider it.*
>
> Mr. Hurley. *I haven't any* and I haven't had time to prepare any. I didn't know—this kind of came up suddenly.
>
> The Court. Was there any other point that you wanted to know about?
>
> Mr. Hurley. And they can convict on that other evidence?
>
> The Court. It simply tells them that there must be—they must find that on the 4th day of August they had marijuana out there; on the 4th; not any other day.
>
> Mr. Hurley. It is not any time before the—— (Interrupted).
>
> The Court. No, no, just the one date.
>
> Mr. Hurley. Could I have about a 15-minute recess before I argue?
>
> The Court. I will give you 10 minutes." (Italics ours.)

The only possible inference suggesting any unfairness would be Mr. Hurley's statement "* * * and I haven't had time to prepare any * * *" which lacks merit for the two reasons that the objectionable evidence complained of was offered in its entirety during the Government's case in chief and certainly appellant's counsel had ample time, having

been put on notice before he proceeded with his case and considerably before the jury would be charged, to present any instruction he desired; and there is no showing in the above set forth language that appellant requested any time within which to prepare an instruction, assuming that he had a prayer of an excuse for not having done so before the time the jury would normally be charged.

III.

NO COMPETENT OR RELEVANT EVIDENCE WAS PROPERLY OFFERED BY THE APPELLANT AND REFUSED ADMISSION BY THE TRIAL COURT.

Appellee agrees that the general law and supporting decisions consistently show that as concerns witnesses, such may properly be questioned concerning matters tending to show bias and prejudice towards any of the parties. In qualification of this general rule, it seems equally well established that the trial judge may properly limit such evidence to the fact itself and may exclude excursions into details.

> *State v. McCann,* 47 Pac. 443:
>
> "The remaining questions were directed to occurrences between the deceased and the defendants, relating to altercations over road matters, and the part that the witness took therein. The objection was properly sustained to these questions. The witness had already testified he was a friend of the deceased, and the court informed counsel for the defendants that he might interro-

gate the witness as to what feeling he had, friendly or unfriendly, toward the defendants, and *this was all the defendants were entitled to show.*" (Italics ours.)

Also, *State v. Constantine,* 93 Pac. 317:

"The fact that such civil action had been begun was material on the question of the credibility of the witness as it tended to show he had more than the usual interest in the result of the criminal prosecution against the appellant, *but all that was material was proven when the fact itself was admitted by the witness.*" (Italics ours.)

Certainly the record shows that the trial Court allowed the appellant to far exceed the bounds normally permitted by Courts in showing the bias or prejudice, if any existed, of the prosecuting witness. (Tr. of R. 170, 171, 172, 179, 180, 181, 200, 201.) As the fact itself was many times brought out to the jury, appellant's only reasonable complaint could be that an exhaustive discussion, including proof of the matters which he claims relevant to show motive and bias, could be offered for impeachment purposes and it is well settled that such an offer must contain a proper foundation, which appellant failed to offer, probably because of impossibility, there having been no indictment, let alone conviction, for impeachment purposes. Accordingly, the trial court was justified in placing some limitation on appellant's pursuit of this subject. For a more detailed treatment of this proposition appellee respectfully directs attention to the Government's brief filed with this Court as a

companion case involving the same appellant and the same assignment, No. 12,868.

CONCLUSION.

For the reasons aforementioned, appellee respectfully prays that the jury verdict and sentence in the case at bar not be disturbed.

Dated, August 6, 1951.

EVERETT W. HEPP,
United States Attorney,
HUBERT A. GILBERT,
Assistant United States Attorney,
Fourth Judicial Division, Territory of Alaska,
Attorneys for Appellee.

Service by receipt of copy of the foregoing brief of appellee is hereby acknowledged, this 27th day of July, 1951.

(Signed) *Julien A. Hurley,*
Attorney for Appellant.